

## A Story of Her Own: A Feminist Critique of Copyright Law

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*Abstract: This comment explores the ways in which women are using new digital technologies to subvert dominant, male-centered mass media. This comment posits that, although women have more spaces to create due to new technologies, their works are stifled by modern copyright law because it discourages re-imaginings of already existing works. This comment builds on Lawrence Lessig's theory of Read/Write culture, applies it from a specifically feminist lens, and argues that mass media conglomerates have an interest in keeping copyright law as it currently is, because it lets them maintain power over what kinds of culture is distributed. This comment specifically discusses fan fiction and the work of specific female artists such as Margaux Lange, who creates jewelry from Barbie appendages. I compare the numbers of women creating these alternative forms of culture to the composition of popular, commercial culture to demonstrate the ways in which male, commercial creation is more highly valued under our current copyright system. This comment attempts to explain the ways in which women's voices are largely left out of mainstream, commercial culture and how copyright law is, in part, responsible for the void.*

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## I. INTRODUCTION

In 2001, Argentinean filmmaker Albertina Carri introduced a film entitled *Barbie también puede estar triste* (*Barbie Can Be Sad, Too*) that depicted Barbie and Ken dolls acting out various sexual fetishes.<sup>1</sup> The film was an attempt to critique female sexuality, as well as the ubiquitous nature of the Barbie doll and its meaning as a cultural icon.<sup>2</sup> After its first screening in Mexico City, Mattel, the company that owns the Barbie doll, successfully received an injunction preventing the film from being shown again based on a claim of copyright infringement.<sup>3</sup>

The same year, Alice Randall published a book entitled *The Wind Done Gone*. Critiquing the racism of *Gone with the Wind*, she re-told Margaret Mitchell's famous story from a slave's perspective.<sup>4</sup> Margaret Mitchell's estate was not pleased, and they sued Alice Randall for copyright infringement.<sup>5</sup> After prolonged litigation, Randall, backed by a national publishing company and a team of experienced lawyers, was able to reach a settlement agreement and the injunction, barring the book from being published, was lifted.<sup>6</sup> Thanks to these resources, *The Wind Done Gone* is on the shelves today.

Both Carri and Randall were trying to engage in a dialogue with the culture that surrounds them, along with the stories and icons that have been cemented into our society as dominant narratives of both female sexuality and racial behavior. Both women faced threats from large corporations, but the outcomes of the threats were radically different. This difference provides an interesting point of comparison.

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<sup>1</sup> See Gregory Valens, Barbie Shines in Buenos Aires, FilmFestivals.com, Apr. 25, 2001, [http://www.filmfestivals.com/cgibin/shownews.pl?obj=ShowNews&CfgPath=ffs/filinfo&Cfg=news.cfg&ews=general&text\\_id=17362](http://www.filmfestivals.com/cgibin/shownews.pl?obj=ShowNews&CfgPath=ffs/filinfo&Cfg=news.cfg&ews=general&text_id=17362).

<sup>2</sup> Karen Goldman, *Hegemonic and Oppositional Representations of Latinidad in Hispanic Barbie*, in FROM BANANAS TO BUTTOCKS: THE LATINA BODY IN POPULAR FILM AND CULTURE 263, 273 (Myra Medible ed., 2007).

<sup>3</sup> *Id.*

<sup>4</sup> See ALICE RANDALL, *THE WIND DONE GONE* (2001).

<sup>5</sup> See *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001) (holding that Randall's work was likely to be a fair use because of its critique of slavery and remanding it back to the district court).

<sup>6</sup> NEIL WEINSTOCK NETANEL, *COPYRIGHT'S PARADOX* 4 (2008).

While there is not much written about Carri's film, it seems clear that Carri did not, and most likely could not, defend against a lawsuit from Mattel. Had she taken legal action she may have been able to claim fair use and could have successfully been able to show the film.<sup>7</sup> Randall, on the other hand, backed by a national publishing company, was able to pursue a lawsuit.

Like Carri, many individuals engaging in critical dialogue with canonical works lack the support of large corporations and do not have the resources to defend against legal challenges. Instead, they are privately creating works that question the authority of dominant cultural narratives and attempting to fight against the control the popular media (represented by a selection of large corporations) exercises over culture. The fan fiction community<sup>8</sup> is a perfect example of this type of creation. If one browses any fan fiction website<sup>9</sup> he or she will inevitably see thousands of re-tellings of movies, books, and television shows. For example, one website contains a retelling of a scene in *Gone With the Wind*, but in this story, Scarlett and Melanie, the two main female characters, have a lesbian encounter.<sup>10</sup> Fan fiction sites dedicated to science fiction brands such as Star Wars and Star Trek, which are stereotypically seen as forms of entertainment that appeal to men and boys, contain stories that involve homosexual encounters between heterosexual male characters, and in some cases, men getting pregnant.<sup>11</sup>

While the identities of the authors on these websites are usually not revealed, it may not be a stretch to imagine that the authors of these stories are merely trying to inject some of their own identities

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<sup>7</sup> Cf. *Mattel, Inc. v. Walking Mountain Productions*, 353 F.3d 792 (9<sup>th</sup> Cir. 2003) (holding an artist's photographs of naked Barbie dolls in various kitchen objects to be a parody and within the protections of fair use).

<sup>8</sup> "Fan fiction is a broadly-defined term for stories about characters or settings written by fans of the original work, rather than by the original creator. Works of fan fiction are rarely commissioned or authorized by the original work's owner, creator, or publisher; also, they are almost never professionally published. Fan fiction, therefore, is defined by being both related to its subject's canonical fictional universe while simultaneously existing outside that universe." Fan Fiction, Wikipedia, [http://en.wikipedia.org/wiki/Fan\\_fiction](http://en.wikipedia.org/wiki/Fan_fiction) (last visited Jan. 25, 2010).

<sup>9</sup> See, e.g., [www.fanfiction.net](http://www.fanfiction.net).

<sup>10</sup> *Somebody's Darling*, Halrloprillalar, Mar. 1, 2004, <http://prillalar.com/fic/stories/000288.php>.

<sup>11</sup> See *infra* Part IV.B.

into the stories which do not represent their life experiences. This is exactly what Alice Randall wanted to do by representing her perspective as a black woman in writing *The Wind Done Gone*.<sup>12</sup> Although fan fiction authors are doing something very similar to what Randall was doing in writing *The Wind Done Gone*, they do not receive the same legal protections mainly because they do not have the support of publishing companies or media conglomerates that can represent their interests. Sonia Katyal, a prominent intellectual property scholar, explains that fan fiction “[occupies] a vulnerable space within the artistic and literary market precisely because of [its] fragile, potentially illegal status.”<sup>13</sup> Authors on these websites are often targets of take down notices, which they often obey because these authors usually do not have the means to instigate a lawsuit or may not know their potential for remedies.<sup>14</sup>

In this comment, I will explain how the process of engaging with dominant culture in this way – critiquing narratives that are handed down through a hierarchical process of valuing certain forms of art – is a specifically feminist project. By engaging in a specifically feminist critique of copyright law, I discuss how feminist ideas of speaking up to power and critiquing hierarchical systems of control are directly reflected in the works of artists such as Carri and Randall who do not want to accept what is given to them by the media. I will demonstrate how current copyright law is structured within a patriarchal framework that protects and promotes specific types of knowledge and prevents any subsequent use of this knowledge for criticism. Specifically, I examine the barriers faced by those creating feminist projects that speak up to power and challenge these hierarchies, due to the structure of the current copyright system.

While engaging in this critique, I discuss Lawrence Lessig’s idea of Read/Write culture. Lessig, a prominent copyright scholar, calls this process of interacting with dominant culture “Read/Write” (“RW”) culture, compared to “Read/Only” (“RO”) culture, where individuals

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<sup>12</sup> In an interview with CNN, Randall stated, “I am a black woman, and I have read ‘Gone With the Wind’ and had something to say about that book. I think it was the time has come for America to understand how an African-American woman, and many African-Americans, view the book that has influenced our country’s culture and how we view ourselves as a country.” Interview with Alice Randall, CNN Entertainment, June 22, 2001, <http://archives.cnn.com/2001/SHOWBIZ/books/06/22/randall.cnn/index.html>.

<sup>13</sup> Sonia Katyal, *Performance, Property, and the Slashing of Gender in Fan Fiction*, 14 AM. U. J. GENDER SOC. POL’Y & L. 461, 505 (2006).

<sup>14</sup> *Id.*

are just consuming culture without interacting with it.<sup>15</sup> Lessig argues that RW culture is important because it produces an “amateur culture”<sup>16</sup> – people who “add to the culture they read by creating and re-creating the culture around them.”<sup>17</sup> Furthermore, amateur culturists may create primarily for the sake of creating, not for commercial gain.<sup>18</sup> Copyright law, however, operates from an RO perspective.<sup>19</sup> Works are so heavily protected that there is little room for re-writing or re-interpreting unless, like Alice Randall, one has the ability to defend a copyright lawsuit and one’s work fits within the narrow definition of parody or the ever-elusive fair use standard.<sup>20</sup> While Lessig does speak about the hierarchical structure of copyright law, he does not specifically consider the relationship between gender and culture. It is hard to ignore this relationship because with the rise of digital culture, there has been an explosion of amateur culture being created by women who are taking advantage of these new digital tools to create.<sup>21</sup> Subverting dominant culture by reappropriating traditional models of creativity comes at a high price – namely facing lawsuits for copyright infringement, being bullied into taking down

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<sup>15</sup> LAWRENCE LESSIG, REMIX 28 (2008) [hereinafter LESSIG, REMIX].

<sup>16</sup> While I will continue to use the term amateur to accurately represent Lessig’s ideas, I want to make clear that it is in no way a value judgment of the works of which I am speaking.

<sup>17</sup> LESSIG, REMIX, *supra* note 15, at 28.

<sup>18</sup> Talks: Larry Lessig: *How Creativity is Being Strangled by the Law*, TED, Nov. 2007, [http://www.ted.com/index=hp/talks/larry\\_lessig\\_says\\_the\\_law\\_is\\_strangling\\_creativity.html](http://www.ted.com/index=hp/talks/larry_lessig_says_the_law_is_strangling_creativity.html).

<sup>19</sup> LESSIG, REMIX, *supra* note 15, at 28.

<sup>20</sup> I would like to note that this comment will not include any prolonged discussion of fair use. While fair use defenses can be a useful tool for copyright lawsuits, there have been many scholars who have explored these options, and I do not feel an extended discussion of fair use would benefit the scope of this comment. Fair use is a notoriously hard standard to define, and something that may seem like fair use, may be found by the courts to be an infringement. For an extended discussion of fair use, see, e.g., LESSIG, REMIX, *supra* note 16; NETANEL, *supra* note 6; Ann Bartow, *Fair Use and the Fairer Sex: Gender, Feminism, and Copyright Law*, 14 AM. U. J. GENDER SOC. POL’Y & L. 551 (2006); Carys J. Craig, *Reconstructing the Author-Self: Some Feminist Lessons for Copyright Law*, 15 AM. U. J. GENDER SOC. POL’Y & L. 207 (2007); Katyal, *supra* note 13; Rebecca Tushnet, *Payment in Credit: Copyright Law and Subcultural Creativity*, 70 LAW & CONTEMP. PROBS. 135 (2007).

<sup>21</sup> See *infra* Part IV.B.

work, or being discouraged from disseminating work at all because of the threat of copyright lawsuits.

While some scholars argue that American copyright law loses female voices because it does not provide protection to “feminine” works, such as cooking recipes, sewing patterns, and fashion designs,<sup>22</sup> there is a broader systemic problem with copyright law that will not be solved merely by extending protection to these works. Even if copyright law were extended to protect “feminine” works, those who would benefit the most, I will argue, are those at the very top of the field, making the most money, and gaining the most publicity. In this comment I argue that copyright law often works to protect dominant, commercial culture, which tends to be made by whites, men, and heterosexuals,<sup>23</sup> and does not necessarily appeal to people of color, women, or members of the Lesbian, Gay, Bisexual, Transgender (LGBT) community. By discouraging RW culture, we lose the voices of groups of people who are creating culture in the margins in order to critique this dominant culture.

This paper will proceed in four parts. Part II begins with a brief background of copyright law in the United States to make explicit the types of works that are protected and those that are not.

Part III continues with a discussion of Lessig’s idea of RW culture, and I will demonstrate how his vision does not specifically take into account the fact that while these new technologies have been created for the masses to use, women are still left out of the mainstream media. In doing so, I will provide a picture of what the mainstream media currently looks like. This information will then drive a discussion of what a feminist critique of copyright law would look like. I will also assert reasons why it would not be wise to merely extend copyright protection to “feminine” works, since this would not break down but reinforce a patriarchal and hierarchical culture.

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<sup>22</sup>See, e.g., Bartow, *supra* note 20, at 572.

<sup>23</sup>See, e.g., MARTHA M. LAUZEN, *THE CELLULOID CEILING: BEHIND-THE-SCENES EMPLOYMENT OF WOMEN ON THE TOP 250 FILMS OF 2008* (2009) (“In 2002, women comprised 15% of all directors, executive producers, producers, writers, cinematographers, and editors working on the top 250 domestic grossing films.”); see also Patricia Cohen, *Charging Bias by Theaters, Female Playwrights to Hold Meeting*, N.Y. TIMES, October 25, 2008, available at <http://www.nytimes.com/2008/10/25/theater/25women.html?fta=y> (describing the lack of female playwrights in the New York theater scene and counting only ten plays by women of the fifty plays by living American playwrights being mounted at fourteen Broadway theaters); LESSIG, *REMIX*, *supra* note 15, at 37-38 (explaining that the business model of the content industry depended on “controlling the distribution of copies of culture” and the law “supported this business model.”).

Part IV specifically outlines the arenas where women are creating culture, and exactly how they are dissecting, critiquing, and reappropriating mainstream commercial culture. I will discuss the ways in which these creators are being harmed by new technology surveillance methods, which often lead to increased bullying and control by the owners of the original copyrights, and how their ability to create is often sacrificed due to the threat of lawsuits. In Part V, I conclude.

## II. BACKGROUND OF AMERICAN COPYRIGHT LAW

When copyright law was originally created in the United States, it bore very little resemblance to the ever-expanding system that currently exists.<sup>24</sup> Partially due to the evolution and invention of new technologies that could not have been conceived of in the late 18<sup>th</sup> century, copyright law had to evolve according to the demands of the corporations who slowly began to dominate the mass media.<sup>25</sup> In order to understand this evolution and how much copyright law has changed, it is important to examine the foundations of American copyright law as well as the basic principles of current American copyright law.

“Our whole law relating to literary and artistic property is essentially an inheritance from England.”<sup>26</sup> In 1710, the British Parliament enacted the Statute of Anne, which provided for “the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during Times therein mentioned.”<sup>27</sup> It represented a large shift in English law as it provided rights to authors as well as printers and booksellers.<sup>28</sup>

The Framers of the Constitution, taking the lead from the British belief that authors should have certain rights to their works, added to the Constitution a clause which empowers Congress “to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings

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<sup>24</sup> See NETANEL, *supra* note 6, at 55.

<sup>25</sup> See LESSIG, REMIX, *supra* note 15, at 37-38.

<sup>26</sup> ROBERT A. GORMAN & JANE C. GINSBURG, COPYRIGHT 1 (7th ed. 2006).

<sup>27</sup> 8 Anne c. 19, 1710.

<sup>28</sup> GORMAN & GINSBURG, *supra* note 26, at 3.

and discoveries.”<sup>29</sup> In 1790, Congress enacted the first federal copyright act, entitled “An Act for the encouragement of learning.”<sup>30</sup> Thomas Jefferson viewed copyright as a “necessary evil” favoring provision for “just enough incentive to create, nothing more, and thereafter allowing ideas to flow freely as nature intended.”<sup>31</sup> It accorded exclusive rights to authors who created maps, navigational charts, or books to “print, reprint, publish, or vend” for a period of fourteen years, which was renewable one time.<sup>32</sup> Over the years, Congress expanded the protections that authors received, including adding musical compositions and graphics to the list of works that could receive protection and eventually lengthening the duration of the copyright term.<sup>33</sup> These changes, however, were always suited to the wishes of “private stakeholders,” who stood to benefit from the modifications.<sup>34</sup> In 1976, Congress enacted the Copyright Act of 1976, which greatly expanded the protections that the most recent Copyright Act of 1909 had granted.<sup>35</sup>

Under the 1976 Copyright Act, “all original works of authorship” published or unpublished are protected.<sup>36</sup> Congress abolished the renewal requirement for new works, and extended the duration of

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<sup>29</sup> U.S. CONST., art. I, § 8, cl. 8.

<sup>30</sup> NETANEL, *supra* note 6, at 54.

<sup>31</sup> Robert S. Boynton, *The Tyranny of Copyright?*, N.Y. TIMES, Jan. 25, 2004, available at <http://query.nytimes.com/gst/fullpage.html?res=9801EFDA1439F936A15752CoA9629C8B63>.

<sup>32</sup> NETANEL, *supra* note 6, at 54.

<sup>33</sup> *Id.* at 55. Netanel also notes that “as copyright law provides for ever greater exclusive rights, it both fuels and increasingly comports with a naïve notion of absolute property right. It reinforces the view that copyright owners are intrinsically entitled to control and reap the full value of each and every use of copyright-protected expression, thus smoothing the way to still further expansion.” *Id.*

<sup>34</sup> See JESSICA LITMAN, DIGITAL COPYRIGHT 23 (2001) (“By the 1920s . . . whenever a member of Congress came up with a legislative proposal without going through the cumbersome prelegislative process of multiparty negotiation, the affected industries united to block the bill. Copyright bills passed only after private stakeholders agreed with one another on their substantive provisions. This pattern has continued to this day.”).

<sup>35</sup> *Id.* at 57; see also GORMAN AND GINSBURG, *supra* note 26, at 8 (“The 1976 Act marked a significant philosophical departure from the centuries-old traditions reflected in the Statute of Anne, the first U.S. Statute in 1790, and the 1909 statute.”).

<sup>36</sup> GORMAN AND GINSBURG, *supra* note 26, at 8



protection to life of the author plus fifty years.<sup>37</sup> Furthermore, authors are not required to register their works in order for them to be protected by copyright, but rather, as soon as a work is “fixed” or reproduced in a tangible medium, it is protected by copyright.<sup>38</sup> Authors no longer only have exclusive rights to reproduce, but also hold the rights to prepare derivative works, distribute copies of the copyrighted work to the public, perform the copyrighted work publicly, and display the copyrighted work publicly.<sup>39</sup>

In 1998, after lobbying by the copyright industry, Congress passed the Sonny Bono Copyright Term Extension Act (“CTEA”), which gave copyright owners another twenty years of protection.<sup>40</sup> The CTEA was challenged in front of the Supreme Court in a fundamental case in American copyright law, *Eldred v. Ashcroft*.<sup>41</sup> The plaintiff argued that “if Congress can extend existing terms, then there is no ‘stopping point’ to Congress’s power under the Copyright Clause.”<sup>42</sup> But the Supreme Court affirmed the decision of the D.C. Circuit, holding that the CTEA was not unconstitutional, despite scholarly views that this was an unconstitutional exercise of Congress’s power and a violation of the First Amendment.<sup>43</sup> It has been argued that these expansions have resulted in a system of copyright that would seem incredibly foreign to its original creators.<sup>44</sup>

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<sup>37</sup> NETANEL, *supra* note 6, at 57.

<sup>38</sup> GORMAN AND GINSBURG, *supra* note 26, at 75.

<sup>39</sup> *Id.* at 37-38 (these rights were created with the enactment of the 1909 Copyright Act).

<sup>40</sup> NETANEL, *supra* note 6, at 57.

<sup>41</sup> 537 U.S. 186 (2003).

<sup>42</sup> LAWRENCE LESSIG, *FREE CULTURE* 228 (2004) (hereinafter LESSIG, *FREE CULTURE*).

<sup>43</sup> *See id.* at 228-43; NETANEL, *supra* note 6, at 172.

<sup>44</sup> *See* LESSIG, *FREE CULTURE*, *supra* note 42, at 138. *See also* LITMAN, *DIGITAL COPYRIGHT*, *supra* note 34, at 25 (“As the entertainment and information markets have gotten more complicated, the copyright law has gotten longer, more specific and harder to understand.”); *id.* at 72 (“The problem, though, is that our current copyright statute could not be taught in elementary school, because elementary school students couldn’t understand it. Indeed, their teachers couldn’t understand it. Copyright lawyers don’t understand it.”).

### III. NEW TECHNOLOGIES AND FEMINIST THEORY'S APPLICATION TO THE GENDERED DIVISION OF MODERN MASS MEDIA

In this section, I first discuss Lessig's analysis of RW culture. I will then demonstrate how his theory fails to account for the gendered divisions of mainstream media by looking at its largely male composition. Lastly, I will explain why a feminist critique is appropriate, and what this critique looks like.

#### A. NEW TECHNOLOGIES AND THEIR IMPLEMENTATION IN MODERN CULTURE

##### 1. LESSIG'S RW CULTURE

When copyright law was originally created, there was only a limited amount of creative activity that was possible with the technologies that existed. Even after the advent of sound recording and the film industry boom, only a limited sector of the population could use these technologies given their costs.<sup>45</sup> However, there now exist new technologies such as CDs, DVDs, and inexpensive video cameras, as well as programs like Garage Band and iMovie and platforms such as YouTube, that are accessible to larger portions of the population. Consequently, there has been a rise in amateur culture.<sup>46</sup>

Lessig describes amateur culture as a type of creative activity where people are trying to create for personal satisfaction rather than for profit.<sup>47</sup> This amateur culture is more participatory than cultures of the past because the audience engages with already existing artistic creations. Precisely because of these new technologies, our culture is becoming an RW, rather than an RO, culture.<sup>48</sup>

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<sup>45</sup> See generally LESSIG, REMIX, *supra* note 15, at 30.

<sup>46</sup> See *id.* at 30.

<sup>47</sup> Talks: Larry Lessig, *supra* note 18.

<sup>48</sup> LESSIG, REMIX, *supra* note 15, at 28. Lessig explains that young people are now, rather than just viewing culture and absorbing it, "add[ing] to the culture they read by creating and re-creating the culture around them." *Id.* See also Rebecca Tushnet, *Payment in Credit: Copyright Law and Subcultural Creativity*, 70 LAW & CONTEMP. PROBS. 135, 138 (2007) ("Like multiple stagings of a Shakespeare play, fan texts rework and repeat familiar characters and situations in new contexts . . . call[ing] attention to the choices made both by . . . the official texts.").

However, the mainstream media has been relying on an RO culture in order to maintain control over culture, the ways in which it is disseminated, and ultimately the financial benefits it brings.<sup>49</sup> As Professor Lessig explains, RO culture has “come to define what most of us understood culture, or at least ‘popular culture’ to be.”<sup>50</sup>

Because digital technology can be used in radically different ways than analog technology, it can be more easily manipulated and changed.<sup>51</sup> The ability for anyone to manipulate, change, and create amateur culture means that the mainstream media will no longer have sole control over the content industry.<sup>52</sup> If anyone can acquire the tools to create or copy film or music, there will be a lower demand for the pricey films and music distributed by mainstream media corporations. Mainstream media corporations have, therefore, become aggressive about protecting their interests in maintaining control over culture. Their financial interests have been threatened.<sup>53</sup> “In less than a decade, the much-ballyhooed liberating potential of the Internet seems to have given way to something of an intellectual land grab, presided over by legislators and lawyers for the media industries.”<sup>54</sup>

As a result of the media fighting against the new potentials of digital technologies, a subculture of creativity is rising, which consists of artists, lawyers, and scholars who want to fight against the stifling nature of these increased copyright protections and continue to build

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<sup>49</sup> See LESSIG, REMIX, *supra* note 15, at 30-31 (“Core copyright industries are responsible for an estimated 6% of the nation’s total GDP totaling \$626 billion a year.”).

<sup>50</sup> *Id.* at 31.

<sup>51</sup> *Id.* at 38 (explaining that the code of digital technology does not prevent it from being duplicated unlike the codes of analog technologies).

<sup>52</sup> *Id.*

<sup>53</sup> See *id.* at 38-39 (explaining how the content industry began working with the U.S. Department of Commerce to devise a strategy to protect “a business model from digital technologies.”). Lessig also describes the “copyright wars,” which resulted in lengthened durations of copyright protection and increased litigation against commercial entities such as MP3.com and Napster. *Id.* at 39. See also Boynton, *supra* note 31 (“[T]he implications of this freedom have frightened some creators – particularly those in the recording, publishing and movie industries – who argue that the greater ease of copying and distribution increases the need for more stringent intellectual property laws.”).

<sup>54</sup> *Id.*; see also LITMAN, DIGITAL COPYRIGHT, *supra* note 34, at 25-27.

an RW mainstream culture.<sup>55</sup> The Free Culture movement, led by scholars such as Lessig, aims to “build a bottom-up, participatory structure to society and culture, rather than a top-down, closed, proprietary structure.”<sup>56</sup>

Lessig believes that RW culture is extremely important to encourage amateur culture and prevent complete commercial domination over culture. However, as I make clear in the next subsection, while Lessig believes that more “amateurs” are breaking into cultural production, the media is still heavily dominated by men. As I will further explain, copyright is a masculine field because it is a form of property. Copyright is something which individuals feel entitled to assert dominance and control over, which is an inherently masculine view.<sup>57</sup> A feminist lens is therefore appropriate, in looking at how to improve these new technologies and reform copyright law so that women do not continue to be left out.<sup>58</sup> While it is important that these Free Culture activists are trying to break the hierarchal proprietary structure of copyright law, it is also important to ensure that they do not reinforce a gender imbalance.

## 2. THE (MALE) FACE OF MAINSTREAM CULTURE

Some women have been dissatisfied with the ways in which they are treated in the film industry as well as other creative industries such as theater, fashion, and the fine arts.<sup>59</sup> In 2003, Martha Lauzen

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<sup>55</sup> See *id.* ([A] protest movement is forming, made up of lawyers, scholars and activists who fear that bolstering copyright protection in the name of foiling ‘piracy’ will have disastrous consequences for society – hindering the ability to experiment and create and eroding our democratic freedoms.”). See generally LESSIG, *FREE CULTURE*, *supra* note 42; LESSIG, *REMIX*, *supra* note 155.

<sup>56</sup> [http://wiki.freeculture.org/Free\\_Culture\\_Manifesto](http://wiki.freeculture.org/Free_Culture_Manifesto).

<sup>57</sup> See Debora Halbert, *Poaching and Plagiarizing: Property, Plagiarism, and Feminist Futures*, in *PERSPECTIVES ON PLAGIARISM* 111, 111 (Lisa Buranen & Alice M. Roy, eds. 1999) (“The history of intellectual property is a history of masculine creation and birth.”).

<sup>58</sup> See *id.* (“[T]he potential of a postmodern feminist approach makes it possible to offer a substantive critique. Uncovering the assumptions on which copyright is premised can make it possible to revise copyright in a manner appropriate for greater sharing and creativity.”).

<sup>59</sup> The film *Slumdog Millionaire* was a hit in 2008. Despite the positive press it received, some women are unhappy with the way it was marketed. A recent post on *The Hot Pink Pen*, “an advocate for women directors & screenwriters, creative filmmakers who are generally overlooked by the mainstream media,” states:

did a study entitled *The Celluloid Ceiling* which analyzed the behind-the-scenes and on-screen employment of women of the top 250 grossing films of 2002.<sup>60</sup> She discovered that “more than one out of five films released in 2002 employed no women directors, executive producers, producers, writers, cinematographers, or editors.”<sup>61</sup> Furthermore, female characters were dramatically underrepresented, and of the clearly identifiable protagonists, 77% were male and 16% were female.<sup>62</sup>

Currently, studios, even those headed by women, claim that female driven films are not financially successful.<sup>63</sup> Therefore, the argument goes, in these economic times studios need to make money, so they need to make films that appeal to the masses; such films are generally those centered around male protagonists.<sup>64</sup> Despite the success of recent female driven films such as *Sex and the City* and *Mamma Mia*, last year, the president of Warner Bros. stated, “we are no longer doing movies with women in the lead.”<sup>65</sup> When women are

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According to the Internet Movie Database, Danny Boyle is the director of *Slumdog Millionaire* and Loveleen Tandan is his “co-director,” but this morning the Hollywood Foreign Press Association nominated Danny Boyle, and Danny Boyle alone, for a Golden Globe award in the “Best Director” category. Question: If Loveleen Tandan was Danny Boyle’s co-director then, why isn’t she his co-nominee now? I sincerely believe this question deserves an answer, but unless we all ask, we’ll never get one. So please open the pdf at top, print Page One, sign it, & mail it ASAP directly to Chantal Dinnage. If you feel the need to act immediately, then fax it to publicist Michael Russell as well. As my pdf explains, the stakes are high & this really IS something worth fighting for!!!

*Giving Credit, Where Credit is Due*, THE HOT PINK PEN, Dec. 11, 2008, <http://www.thehotpinkpen.com/?p=762>.

<sup>60</sup> LAUZEN, *supra* note 23.

<sup>61</sup> *Id.*; see also Russell Robinson, *Casting and Caste*, 95 CAL. L. REV. 1, 20-21 (2007) (confirming the gender disparity in feature films).

<sup>62</sup> LAUZEN, *supra* note 23.

<sup>63</sup> Lynn Hirschberg, *A Film of One’s Own*, N.Y. TIMES, Sept. 3, 2006, available at <http://www.nytimes.com/2006/09/03/magazine/03actesses.html?ex=1314936000&en=a7d3df6826efc7a5&ei=5088&partner=rssnyt&emc=rss>.

<sup>64</sup> *Id.*

<sup>65</sup> Rebecca Traister, *Chicks Behind Flicks*, SALON, Oct. 11, 2007, [http://www.salon.com/ent/feature/2007/10/11/hollywood\\_women/print.html](http://www.salon.com/ent/feature/2007/10/11/hollywood_women/print.html). Traister also explains, “[m]ore

offered starring roles it is either in romantic comedies or “women-in-peril” films.<sup>66</sup> Further, as Gloria Steinem notes, romantic comedies, or any films centered on a female protagonist are labeled as “chick flicks,” which automatically gives them an air of inferiority.<sup>67</sup>

This trend does not only exist in Hollywood. Female comedians are treated differently than their male counterparts as well. For women, “looks are prized more highly than humor . . . . As a comedian, [Sarah Silverman] is as commonly praised for her good looks as she is for her humor . . . .”<sup>68</sup> In the theater industry, female playwrights held a meeting, after being frustrated by the difficulty in

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women than ever write, direct and produce movies. But we’re in a period in which their on-screen stock is falling.” *Id.*

<sup>66</sup> Richard Corliss et al., *Movies: Girls Just Wanna Have Guns*, TIME.COM, Apr. 22, 2002, <http://www.time.com/time/magazine/article/0,9171,1002269-2,00.html>.

<sup>67</sup> Gloria Steinem, *A Modest Proposal*, THE WOMEN’S MEDIA CENTER, July 6, 2007, <http://www.womensmediacenter.com/ex/070607.html>. She also points out that while men are taken seriously when they write about women, women are not taken as seriously when they write about men, at least not in the world of mainstream media:

Think about it: If Anna Karenina had been written by Leah Tolstoy, or The Scarlet Letter by Nancy Hawthorne, or Madame Bovary by Greta Flaubert, or A Doll’s House by Henrietta Ibsen, or The Glass Menagerie by (a female) Tennessee Williams, would they have been hailed as universal? Suppose Shakespeare had really been The Dark Lady some people supposed. I bet most of her plays and all of her sonnets would have been dismissed as some Elizabethan version of ye olde ‘chick lit,’ only to be resurrected centuries later by stubborn feminist scholars. *Id.*

In a recent article in the *The Times* of London, author Kevin Maher suggests that “increasingly, the modern Hollywood women’s picture or so-called chick flick has become home to the worst kind of regressive pre-feminist stereotype and misogynistic cliché.” Kevin Maher, *Is it Time to Kill the Chick Flick?*, TIMES ONLINE, Feb. 4, 2009 [http://entertainment.timesonline.co.uk/tol/arts\\_and\\_entertainment/film/article5652250.ece](http://entertainment.timesonline.co.uk/tol/arts_and_entertainment/film/article5652250.ece). He attributes this decline in Hollywood to the lack of women in executive positions:

The reason for all this sinister discord is ultimately, of course, men. ‘Fewer than 10 per cent of Hollywood films are written by women, and fewer than 6 per cent directed by women,’ explains Melissa Silverstein, a movie marketing consultant and founder of the company Women & Hollywood. ‘So really what you are seeing is a white male version of women. And that is just unacceptable.’ *Id.*

<sup>68</sup> Jenna Wortham, *Shooting Star*, BUST, Oct./Nov. 2008, at 47. See generally Abby Paige, *Laugh Trap*, BITCH, Fall 2008, at 33.

getting their work produced as compared to their male counterparts.<sup>69</sup> Out of fifty plays being mounted in New York by living American playwrights, forty were by men and ten were by women.<sup>70</sup> Yet, the impression is that outside of the mainstream theater industry, theater festivals are dominated by women.<sup>71</sup> Similar reasons are circulated for this lack of a female presence as in Hollywood, that women's plays do not attract as much money, or are not as relatable as men's plays, or they may not follow the traditional "Aristotelian model of drama," which can make directors uncomfortable.<sup>72</sup>

In the art world, the Guerrilla Girls, a group of women who disguise themselves in gorilla masks, try to expose sexism. One poster of theirs reads: Do Women Have to be Naked to get into U.S. Museums? They then state that "less than 3% of the artists in the [Metropolitan] Museum are women, but 83% of the nudes are female."<sup>73</sup> When the Los Angeles County Museum of Art (LACMA) added a new modern art wing, the Eli Broad Contemporary Art Museum (BCAM), the Guerrilla Girls wrote a letter asking the museum to account for the lack of female artists in the new collection because out of thirty artists, 87% were male.<sup>74</sup>

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<sup>69</sup> Patricia Cohen, *Charging Bias by Theaters, Female Playwrights to Hold Meeting*, N.Y. TIMES, Oct. 25, 2008, available at <http://www.nytimes.com/2008/10/25/theater/25women.html>.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> See Guerrilla Girls, Posters/Actions, <http://www.guerrillagirls.com/posters/index.shtml> (last visited Apr. 15, 2010).

<sup>74</sup> *Id.* The letter read:

Dearest Eli Broad,

It has come to our attention that your Oh So Significant art collection contains an Insignificant number of women and artists of color.

As a civic leader in a city as diverse as L.A., you must feel terrible about this!!! We are sure you will rectify the situation immediately.

All our love,

Guerrilla Girls

The fashion industry is another industry which is heavily dominated by men, and women often feel slighted because there are many female designers who do not receive the same type of recognition that male designers receive. Although women are creating, they are having a harder time breaking into the fashion industry.<sup>75</sup> Furthermore, it has become apparent that male designers often perpetuate the trend by hiring male assistants instead of female assistants, which only serves to further discourage female designers.<sup>76</sup>

Female writers receive the same kind of treatment. Even though there are many women who publish fiction, poetry, and nonfiction, “women’s writing is often met with dismissive assumptions,” which is why for centuries, female writers have written under male pseudonyms – even J.K. Rowling, a hugely successful author, adopted a neutral name for her byline.<sup>77</sup>

But, the “democratization of online writing” might be considered a partial solution to this problem since the Internet can push the boundaries of who is allowed to call herself a writer.<sup>78</sup> And given these depressing statistics in other creative fields, it seems like the digital world is the most sensible place for women to go since they are being excluded from traditional paths to creative success or their work is automatically dismissed because a studio executive or a publisher assumes that it will not make as much money. Film writer and producer Lisa Ziskin stated:

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<sup>75</sup> Eric Wilson, In Fashion, Who Really Gets Ahead?, N.Y. Times, Dec. 8, 2005, available at <http://www.nytimes.com/2005/12/08/fashion/thursdaystyles/08FASHION.html?sq=fashion%20designers%20female&st=cse&scp=1&pagewanted=print> (“Of the young American designers most embraced by retailers and celebrated in the fashion press in recent years, the roll call is almost exclusively male: Zac Posen, Marc Jacobs, Narciso Rodriguez and Mr. Som as well as Jack McCollough and Lazaro Hernandez of Proenza Schouler. Their female contemporaries have had a harder time breaking through, among them Behnaz Sarafpour, Alice Roi and Ms. Subkoff.”).

<sup>76</sup> *Id.* (“‘Gay men stick together like a band of brothers,’ Ms. Subkoff said in an interview. ‘It’s more common for a man to bring up a younger assistant’ who is male ‘and be proud of that,’ she added, ‘whereas a woman would be threatened’ to promote another woman.”). The phenomenon of men sticking together also happens in the blogosphere. Katha Pollitt explains that there are plenty of female political bloggers, but they do not get as much attention because “male bloggers tend not to link to women.” Katha Pollitt, *Invisible Women*, NATION, Mar. 16, 2005, <http://www.thenation.com/doc/20050404/pollitt>.

<sup>77</sup> Anna Clark, *The Ambition Condition*, BITCH, Fall 2008, at 63.

<sup>78</sup> *Id.* at 65.



We know so much about the male experience because it's been fed to us through the literature that the men wrote and the world that the men created, it's a relatively new phenomenon in the modern world that we have power to say what we think and to express ourselves and our sensibility. But we're still considered an alternative class.<sup>79</sup>

The digital world may be a woman's best bet to be heard and to work towards changing what media looks like.<sup>80</sup> The digital world gives women a space where they can immediately disseminate work without having to navigate the world of male-centered and male-created mass media industries. As I describe below, women are taking advantage of these new technologies in order to create their own cultures and their own spaces, often by interjecting their own experiences into already existing stories. But, as I will also make clear, women will only really begin to benefit when copyright law recognizes the space that women need to create and critique.

## B. WHY FEMINISM?

Given the state of the current mass media, one can see why women might want to inject their own experiences into the stories that are fed to them through film, comedy, art, and literature. One of the central goals of feminism has been a project in redefinition.<sup>81</sup> Many feminists

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<sup>79</sup> Traister, *supra* note 65. See also Pollitt, *supra* note 76 (“[The opinion] that opinion writing is a kind of testosterone-powered food fight is a popular idea in the blogosphere.”).

<sup>80</sup> See generally, Pollitt, *supra* note 76 (explaining that there are plenty of women bloggers, but they don't get the same attention as men); Katha Pollitt, *Terrific Women Already Exist*, POLITICAL ANIMAL, Mar. 22, 2005, available at [http://www.washingtonmonthly.com/archives/individual/2005\\_03/005908.php](http://www.washingtonmonthly.com/archives/individual/2005_03/005908.php) (same). See also Ann Bartow, *Women in the Web of Secondary Copyright Liability and Internet Filtering*, 32 N. Ky. L. Rev 449, 458 (2005) (“The Internet . . . actually empowers minority groups ignored or misrepresented in the mainstream information commons, by providing a communication tool through which likeminded individuals could discover each other, and potentially form cognizable, coherent communities fragmented by geography but unified by common interests or goals.”).

<sup>81</sup> A note on terminology: I am aware that words such as “feminism” and “feminist” are loaded terms. Feminism has many definitions and can mean very different things to as many different individuals. Furthermore, many women who might believe in what may be called a “feminist politic” may be hesitant to call themselves feminists because of the way certain sectors of the mainstream feminist movement have excluded other groups. For the sake of this paper, I will define feminism as “a movement to end sexism, sexist exploitation

have struggled to write and record their own experiences into a dominant social narrative, which has been largely defined and written by men.<sup>82</sup> Feminist scholar bell hooks has suggested that “feminists are made, not born,”<sup>83</sup> which reflects the idea that in order for women to end their subordination and challenge the patriarchal hierarchy that currently exists in our society, we must challenge and criticize the “norms, values, and practices that the dominant male culture . . . seeks to impose on everyone.”<sup>84</sup> Challenging dominant society has been central to the feminist movement in its anti-patriarchal, anti-hierarchical project, which is also central to the idea of RW culture, which centers on the ability to challenge and critique the very culture that is being imposed upon us.<sup>85</sup>

Intellectual property is inherently masculine because it is about asserting dominance and control over information.<sup>86</sup> In a society that is slowly dismantling hierarchy, intellectual property law is one hierarchy that remains in place and does not show signs of disruption. This body of law ensures there will be one power at the top controlling the dissemination of information and ensuring that the masses are

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and oppression.” BELL HOOKS, *FEMINISM IS FOR EVERYBODY* 1 (2000) [hereinafter HOOKS, *FEMINISM*]. I subscribe to bell hooks’s definition because, as she explains, this definition does “not imply that men [are] the enemy,” and acknowledges that sexism can be perpetuated by men and women. *Id.* This is especially important to my paper, because it suggests that not only can both men and women perpetuate sexism, but that a feminist project to reform copyright law can involve both men and women working to change the face of mainstream culture.

<sup>82</sup> See Craig, *supra* note 20, at 236; see generally ROSEMARIE PUTNAM TONG, *FEMINIST THOUGHT* 6 (1998) (“If woman is to become a self, a subject, she must, like man, transcend the definitions, labels and essences limiting her existence. She must make herself be whatever she wants to be.”).

<sup>83</sup> HOOKS, *FEMINISM*, *supra* note 81, at 7.

<sup>84</sup> TONG, *supra* note 82, at 7.

<sup>85</sup> See, e.g., CATHERINE A. MACKINNON, *WOMEN’S LIVES MEN’S LAWS* 33 (2005) (“The law that is applied to them and to all women, white or Black, rich or poor. It has not been based on women’s experiences of life, everyday or otherwise . . . . It was not written for our benefit, and it shows.”).

<sup>86</sup> See Halbert, *supra* note 57, at 117 (“The origins of intellectual property law, authorship, originality, and plagiarism are indebted to understanding creations as the domain of males who are the only ones authorized to speak and write.”).

receiving the cultural messages that those at the top want to communicate.<sup>87</sup>

Mainstream media reflects the same sexist views that are present in dominant society. The media's portrayal of women is incredibly sexist, using women's bodies as objects to sell products or to promote television shows or movies.<sup>88</sup> Furthermore, unrealistic portrayals of women in the media can cause women who view this media to feel worse about themselves.<sup>89</sup> In order to challenge these images, women must have a say in the content that is produced, or at least be able to critique it publicly and with protection.

Creating one's own narrative has been something that is central to both feminist and critical race theory.<sup>90</sup> Telling one's own story has been important for both the feminist and critical race project in order to cement experiences of discrimination and subordination into the

<sup>87</sup> See Margaret Chon, *New Wine Bursting from Old Bottles*, 75 OR. L. REV. 257, 265 (1996) (explaining that the current "binary structure of copyright law [is] dependent . . . upon a strict division between author and reader, or original artist and copyist . . ."). See also Rosemary Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue*, 69 TEX. L. REV. 1853, 1866 (1991) ("Laws creating and enforcing intellectual property rights permit, maintain, and perpetuate the commodification of cultural texts and images by securing their market value."); Ann Bartow, *Women in the Web of Secondary Copyright Liability and Internet Filtering*, 32 N. KY. L. REV. 449, 494 (2005) ("Propertization of cultural attributes via Western copyright and patent principles therefore effectively allows some individuals to usurp the rewards from the labor and intellectual creativity of others.").

<sup>88</sup> "A 1997 advertising study showed that white women in roughly 62% of ads were "scantily clad," in bikinis, underwear, etc., while the same was true for 53% of black women. For men, the figure was only 25%. Women were also represented in stances of powerlessness more often, and black women were likely to be featured in animal prints, in predatory poses." Girls, Women + Media Project, *What's the Problem? Facts About Girls, Women and Media*, <http://www.mediaandwomen.org/problem.html> (last visited Jan 29, 2010).

<sup>89</sup> "In a 1992 study of female students at Stanford University, 70% of women reported feeling worse about themselves and their bodies after looking at magazines." *Id.* A direct result of this desire to be perfect as a result of media imagery is the fact that "[s]tudies show that all plastic surgeries among teens increased by almost 50% from 1996-1998 mostly for girls." *Id.* See also Sharlene Nagy Hesse-Biber et al., *Racial Identity and the Development of Body Image Issues among African American Adolescent Girls*, 9 QUALITATIVE REPORT 49 (2004), available at <http://www.nova.edu/ssss/QR/QR9-1/howling.pdf> (exploring, in part, the white media's effect on black adolescent body image). See also About-face, *Facts on the Media*, <http://www.about-face.org/r/facts/media.shtml> (last visited Jan. 6, 2010) (compiling resources to demonstrate the damaging effect that the media can have on the self-esteem and body-image of women).

<sup>90</sup> Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807, 807 (1993).

public psyche and to create institutional memory within groups.<sup>91</sup> It allows an author to counter dominant narratives, which are largely both male and white.

Connection theory suggests that women are inherently connected to another life while men are not. Women feel the desire to continue giving birth of themselves and to continue passing down stories.<sup>92</sup> Connection theory also suggests that collaboration is an inherently female principle. Collaboration and reinterpretation are both ways in which feminists can seek to undermine patriarchal and hierarchal systems of information dissemination and copyright.<sup>93</sup> Ironically, copyright law restricts this type of collaboration and dissemination,<sup>94</sup> despite the notion that, as a feminist project recognizes, there is nothing that is truly original.<sup>95</sup>

Most importantly, a radical feminist politic seeks to not just join the existing sources of power, but also to challenge and overturn these

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<sup>91</sup> *Id.*; see also Patricia Williams, *The Death of the Profane (A Commentary on the Genre of Legal Writing)*, in *THE ALCHEMY OF RACE AND RIGHTS* 44, 48 (1997) ("Law and legal writing aspire to formalized, color-blind, liberal ideals. Neutrality is the standard for assuring these ideals; yet the adherence to it is often determined by reference to an aesthetic of uniformity, in which difference is simply omitted.").

<sup>92</sup> Robin West, *Jurisprudence and Gender*, in *FEMINIST LEGAL THEORY* 201, 207 (Katharine T. Bartlett & Rosanne Kennedy, eds., 1991).

<sup>93</sup> See, e.g., Halbert, *supra* note 57, at 116 ("The process of appropriation (or plagiarism) has political motivations with a very specific cultural and feminist subtext. Appropriation encourages us to understand the sources of cultural production and 'paternal authority,' both aspects of intellectual property from which creation ought to be liberated. For the feminist and postmodernist, appropriation or plagiarism are acts of sedition against an already established mode of knowing, a way of knowing indebted to male creation and property rights.").

<sup>94</sup> See Coombe, *supra* note 87 ("Copyright laws restrict the social flow of texts, photographs, music, and most symbolic works."); Halbert, *supra* note 58, at 115 ("Postmodern feminist provides strategies for cultural creation, but these strategies clash at the ideological level with the law.").

<sup>95</sup> See, e.g., Jessica Litman, *The Public Domain*, 39 *Emory L.J.* 965, 967 (1990) ("Because copyright's paradigm of authorship credits the author with bringing something wholly new into the world, it sometimes fails to account for the raw material that all authors use."). Litman goes on to explain that the public domain is something that everyone takes advantage of, but fails to account for. *Id.* This fits in with copyright's system of allowing only a singular theory of authorship rather than making room for a more feminist project of collaboration and joint authorship.

sources of power.<sup>96</sup> Obtaining bare equality will only reinforce the same power structure and ultimately continue to reproduce it, resulting in a structure where those at the top are creating definitions for those in the middle and at the bottom.<sup>97</sup> Women at the top can oppress other women in the same way that men can.<sup>98</sup> For example, even women who have infiltrated the male ranks of Hollywood and have succeeded in gaining respected positions in the industry perpetuate an unspoken rule that films with female protagonists do not succeed in the same way as films with male protagonists. In order to keep their jobs and continue making money, these women do not question the rule.<sup>99</sup>

The idea that women need to do more than merely infiltrate the ranks of the mainstream media is directly related to copyright arguments concerning whether copyright law can become more equal by including “feminine works” as part of what is covered by copyright protection. Some copyright scholars argue that certain types of creative works within the domestic sphere, which presumably are more likely to be created by women, should be protected, benefiting women by affording them a wider range of creative protection.<sup>100</sup> The

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<sup>96</sup> See BELL HOOKS, *FEMINIST THEORY FROM MARGIN TO CENTER* 92 (2000) [hereinafter HOOKS, *THEORY*] (“Before women can work to reconstruct society, we must reject the notion that obtaining power in the existing social structure will necessarily advance feminist struggle to end sexist oppression.”).

<sup>97</sup> See *id.* (“Much feminist thought reflects women’s acceptance of the definition of femaleness put forth by the powerful.”).

<sup>98</sup> “There is no way—none—for anyone in this society to make a great deal of money without exploiting other people.” *Id.* at 93.

<sup>99</sup> See Traister, *supra* note 65 (explaining that after the statement by the head of Warner Bros. that they would no longer make films with women as the lead roles, “female film executives seemed to regard the sentiment as a distillation of a broader antipathy toward women in the film business,” and “few women . . . could even muster real shock at [the] story.”). See, e.g., Ann Hornaday, *With Female Characters, Why Does Hollywood Feel that the Stronger they are the Harder they Fail?*, WASH. POST, Oct. 25, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/10/23/AR2009102300194.html> (last visited Jan 16, 2010) (looking at Hilary Swank’s new movie “Amelia” as an example of a movie with a strong female protagonist that has not succeeded at the box office, and why it means that fewer of these movies get produced).

<sup>100</sup> See Ann Bartow, *Fair Use and the Fairer Sex: Gender, Feminism, and Copyright Law*, 14 Am. U. J. Gender Soc. Pol’y & L. 551, 572 (2006) (“While it is clear that female authors who produce creative content in direct competition with men can make parallel use of the copyright industrial complex . . . it is less clear that copyright protections are as readily available for more traditionally feminine creative arts.”).

types of creative works that are usually cited are cooking recipes, sewing patterns, and fashion designs.<sup>101</sup> The assumption is that these are the types of works that women create. Therefore, if we afford them copyright protection, then we will equalize the playing field in terms of the number of women who receive copyright protection as compared to men.

This assumption is problematic. Just because a field, fashion for instance, may be seen as more feminine does not mean that women actually dominate the top of that field. While there may be many women creating fashion, the face of the mainstream fashion industry is largely male.<sup>102</sup> Therefore, the designers who would benefit most from copyright protection are those at the top of the field — those who have enough money to press charges against supposedly infringing designs. Statistically, those designers are more likely to be men.<sup>103</sup> Therefore, this type of protection may not benefit women in the way that many scholars hope it might. Adding more layers of copyright protection will only increase the hoops women must jump through in order to create in the ways they want, ultimately restricting creativity.

While certain strands of feminist thought might subscribe to the idea that putting a few women in positions of power is enough,<sup>104</sup> my feminist vision of copyright is not just about protecting some women and helping them rise to the top. bell hooks explains that some feminists, by making the movement solely about women gaining equality with men, ignored the oppression of men as well.<sup>105</sup> She further states that “[m]en who actively struggle against sexism have a place in feminist movement . . . . Feminists have recognized and supported the work of men who take responsibility for sexist

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<sup>101</sup> *Id.*

<sup>102</sup> Wilson, *supra* note 75 (explaining that the fashion industry is dominated by men, in terms of who is in the public eye, stating that “[e]ven though women are entering the industry at the bottom, they are not rising proportionally to the top.”).

<sup>103</sup> Although, for example, fewer than 7% of students at Parsons School for Design in New York are men, “‘Who’s Who in Fashion,’ a directory published by Fairchild Publications, is split 60-40 in favor of men, and ‘The Encyclopedia of Clothing and Fashion,’ published last year by Charles Scribner’s Sons, included entries on 36 female and 69 male designers.” *Id.*

<sup>104</sup> See HOOKS, *THEORY*, *supra* note 96, at 85 (explaining that certain feminist writers “emphasiz[ed] women’s powerlessness and argue[d] in favor of women working to obtain power within the existing social structure, while remaining ambivalent about whether women’s exercise of power would be any less corrupt or destructive than men’s.”).

<sup>105</sup> *Id.* at 68.

oppression . . . .”<sup>106</sup> In order to change the hierarchical structure of copyright law, it will take both men and women seeking to change it as well as valuing critical perspectives of dominant, mass media controlled culture from everyone.

#### IV. CRITIQUING CULTURE

Using the analysis from above, in this section, I will demonstrate how women are using new technology to create and fight the largely male, heterosexual mainstream culture. I will also discuss how these women receive mixed messages. While certain companies, such as Apple, have developed tools like Garage Band and iMovie to facilitate creation of these critical works,<sup>107</sup> the law dictates to the creators that they should not create in the ways they are creating.

##### A. NEW TECHNOLOGIES, NEW (FEMALE) VOICES

Advances in technology have provided an important and broad space for artists to question and critique the dissemination of information and the authority of creators.<sup>108</sup> These developments allow female creators to take control over what is distributed through mainstream media outlets. In this section I use examples from visual art and fan fiction to demonstrate my point.

##### 1. VISUAL ART

On her website, Margaux Lange, an artist who creates jewelry out of decapitated Barbie dolls, explains, “I also enjoy the funny juxtaposition of wearing the body, on the body. Barbie has become

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<sup>106</sup> *Id.* at 82.

<sup>107</sup> See Apple Unveils New iMacs With CD-RW Drives & iTunes Software, Feb. 22, 2001, <http://www.apple.com/pr/library/2001/feb/22imac.html> (last visited Jan. 16, 2010) (explaining that “iMovie and iTunes are so easy to learn and use, even your parents can use them without getting confused.”). See, e.g., Buffy vs. Edward, Feministing, <http://www.feministing.com/archives/017561.html> (last visited Jan. 16, 2010) (this video mixes scenes from the popular, mid 1990s TV show, *Buffy the Vampire Slayer* with scenes from the wildly popular *Twilight* movie series).

<sup>108</sup> See, e.g., Jessica Litman, DIGITAL COPYRIGHT 108 (2001) (“The most exciting possibilities offered by networked digital technology aren’t its potential to allow the instant distribution of books, music, and movies, but, rather its capacity to generate new classes of *unbooks*, *unmusic*, and *unmovies*.”).

the accessory instead of being accessorized. I take pleasure in the contrast and contradiction of mass-produced materials being transformed and revealed as handmade, wearable works of art.”<sup>109</sup> Lange, although she may not be aware of it, exemplifies the idea of interacting with culture in an active, rather than passive, way.<sup>110</sup> Barbie has been a contested piece of culture for decades. She incites both love and hatred from women everywhere.<sup>111</sup> Her impossible proportions have come to represent a symbol of American femininity, something that no woman will ever be able to achieve, yet many strive for.<sup>112</sup> This symbol, which has been mass-produced by Mattel since the 1960s, is ripe for criticism. Criticizing Barbie is criticizing more than just the doll, but also a standard of femininity and womanhood that has been disseminated and absorbed.<sup>113</sup> There has been an abundance of works by artists who wish to deconstruct the dominance that this particular cultural symbol has had on our society.<sup>114</sup>

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<sup>109</sup> Margaux Lange, About, Artist Statement, <http://www.margauxlange.com/profile-contact/profile/about> (last visited Apr. 12, 2010).

<sup>110</sup> See generally Rob Walker, *Deconstructing Barbie*, N.Y. TIMES MAGAZINE, Jan. 25, 2009, available at [http://www.nytimes.com/2009/01/25/magazine/25wwln-consumed-t.html?\\_r=1&partner=permalink&expd=permalink](http://www.nytimes.com/2009/01/25/magazine/25wwln-consumed-t.html?_r=1&partner=permalink&expd=permalink) (describing Margaux Lange’s work and stating, “[a]fter all, aside from her role as a questionable symbol of femininity, Barbie and her endless series of lifestyle accessories have also come to stand for raw materialism. So it seems appropriate, somehow, that she would find another life, as raw material.”).

<sup>111</sup> Compare Barbie Fan Site, <http://www.fanpop.com/spots/barbie> (last visited Jan. 16, 2010) with Anti-Barbie Official Club, <http://www.antibarbie.com> (last visited Jan. 16, 2010).

<sup>112</sup> One British woman underwent \$1 million worth of plastic surgery to look like a Barbie doll. See Sarah Burge, Real Life Barbie, <http://www.reallifebarbie.com/> (last visited Jan. 30, 2010).

<sup>113</sup> See MIRIAM FORMAN-BRUNELL, GIRLHOOD IN AMERICA: AN ENCYCLOPEDIA 64-65 (2001) (“In all her manifestations, Barbie reveals American cultural ideals of femininity, beauty, and gender roles. Because Barbie exists as a reflection of the hopes and dreams of the girls who play with her, she is a perfect vehicle for exploring attitudes toward women in American society.”); see also Posting of Danielle Belton, The Black Snob, [http://blacksnob.squarespace.com/snob\\_blog/2009/2/3/on-little-black-girls-beauty-and-barbie-dolls.html](http://blacksnob.squarespace.com/snob_blog/2009/2/3/on-little-black-girls-beauty-and-barbie-dolls.html) (On Little Black Girls, Beauty and Barbie Dolls, The Black Snob, blog, Feb. 3, 2009, 17:35 EST) [http://blacksnob.squarespace.com/snob\\_blog/2009/2/3/on-little-black-girls-beauty-and-barbie-dolls.html](http://blacksnob.squarespace.com/snob_blog/2009/2/3/on-little-black-girls-beauty-and-barbie-dolls.html) (explaining an experience coloring the face of a Barbie doll brown, ‘At five it had never occurred to me that I could make Barbie or any drawing anything I wanted it to be. I was following ‘the rules.’ Barbies were white. Beautiful people were white. It had never occurred to me that I could ‘break the rules.’”).

<sup>114</sup> See Karen Goldman, *supra* note 2, at 273 (“Barbie’s hegemonic identity and her very ubiquity have always made her an attractive target for parodical representations of



In 2001, an Argentinean filmmaker, Albertina Carri, created a film entitled *Barbie también puede estar triste* (*Barbie Can Be Sad, Too*), which depicted Barbie and Ken as having various sexual fetishes.<sup>115</sup> Similar to Marguax Lange's work, this film questions the image of Barbie that is perpetuated by Mattel and seeks to put it into another context that indirectly questions the seductive yet chaste standard of femininity that Barbie represents.<sup>116</sup>

On Detritus.net, a site dedicated to "making new creative works out of old ones,"<sup>117</sup> one can find a project entitled *The Distorted Barbie*, in which the artist distorts Barbie's body as well as painting images of her next to objects such as razors and knives.<sup>118</sup> The artist, who remains anonymous, notes that there have been many reactions to her work, which is meant to question the dominance and the cultural meanings of the Barbie doll.<sup>119</sup>

All of these artists who are distorting Barbie's body and her symbolism are, whether consciously or not, engaging in a conversation with the culture that surrounds them, investigating "the power relations that inform and shape"<sup>120</sup> mainstream discourses about culture and society. They are "remixing" culture, acting as active participants rather than passive spectators.<sup>121</sup> Moreover, they are distorting and destroying a very powerful piece of cultural and

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subversive intent. These counterhegemonic efforts include guerilla tactics, such as the Barbie Liberation Organization, which sabotaged toys on store shelves. Other examples include works of criticism and literature that revisit and reinterpret the Barbie image . . . .").

<sup>115</sup> See Valens, *supra* note 1; see also Goldman, *supra* note 2, at 273 ("[The film] features (real) Barbie dolls involved in a series of relationships and encounters that include explicit scenes of sex between lesbian, gay, heterosexual, and transvestite characters.").

<sup>116</sup> "The film offers an alternative view and a biting criticism of those mostly invisible elements that underlie the Barbie culture." Goldman, *supra* note 2, at 273.

<sup>117</sup> Detritus, <http://detritus.net> (last visited Apr. 12, 2009).

<sup>118</sup> The Distorted Barbie, <http://detritus.net/projects/barbie> (last visited Apr. 12, 2009).

<sup>119</sup> *Id.* ("I . . . found that Barbie is quite a loaded symbol. Put a Barbie next to just about anything and meaning will rear its ugly head. This little pink lady is just too well known, and way to [sic] voluptuous to be perceived as just an object. She leaps into our psyches and roams freely in our subconscious, along with mom, the mother superior and the Virgin Mary (yes, I was raised Catholic).").

<sup>120</sup> Craig, *supra* note 20, at 248.

<sup>121</sup> See LESSIG, REMIX, *supra* note 15, at 28.

corporate property. Their works are, in many ways, acts of defiance.<sup>122</sup> Access to tools such as video and the Internet have allowed these artists to create and disseminate their ideas.

## 2. FAN FICTION

In other spaces, women are using their words, rather than images, to engage in a similar type of critique. Fan fiction communities, Internet websites where fans of books, movies, television shows, and video games can retell stories of their favorite characters, have flourished in this new digital age where the Internet has made it possible to “reconstruct our identities.”<sup>123</sup> These fan communities have been a valuable space for women in particular because they are spaces where women can add their own meaning to the culture that surrounds them.<sup>124</sup> Fan fiction, particularly in areas such as science fiction, has been a venue where women can insert themselves into spaces that have been traditionally seen as for boys and men only.<sup>125</sup> Fan fiction allows women to write “themselves into the cultural imagination”<sup>126</sup> and was, at its outset, very subversive because of the way women were recreating and re-imagining established texts. These communities emerged as a reaction to the belief that corporations who publish official fan material often ignore their female fan base.<sup>127</sup> Women, therefore, *needed* to begin these fan communities in order to express their fandom. In fact, it was female fans who organized the

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<sup>122</sup> See Sonia Katyal, *Semiotic Disobedience*, 84 WASH. U. L.R. 489 (2006).

<sup>123</sup> Katyal, *supra* note 13, at 480 (2006).

<sup>124</sup> See Tushnet, *supra* note 20, at 144 (“In the fan-author model, works can be stunningly original in the sense that they cause readers and other writers to recognize new possibilities, such as the transformation of the story of a boy band’s success into a fantastic exploration of gender roles.”); see also Katyal, *supra* note 13, at 468 (“Women have long been the dominant force behind fan fiction . . .”).

<sup>125</sup> See Tammy Oler, *Keep on Trekkin’: Star Trek and the Legacy of Female Fandom*, BITCH, Summer 2008, at 65 (“Through *Star Trek*, women had their first opportunity to create and guide a fan community, creatively imagine themselves, and discover their power as an audience.”).

<sup>126</sup> *Id.* at 66.

<sup>127</sup> *Id.* at 67 (explaining that when Paramount licenses official *Star Trek* books and merchandise, they are marketed towards teenage boys even though at least 50 percent of readers were female).

first dedicated *Star Trek* convention despite the stereotype that sci-fi fandom is created and maintained by men.<sup>128</sup>

Slash fan fiction, a subset of fan fiction, “involves fictional, homoerotic pairings between male characters in the mainstream television programs and films, usually science fiction,” and “represents a striking example of how female consumers can radically rework and recode existing texts.”<sup>129</sup> The sexual pairings are usually written as between males because it “depicts two equals involved in a romantic relationship and negates the uneven power balance afforded to women and men by simply removing ‘gender as a governing and determining force in the love relationship.’”<sup>130</sup> Slash fan fiction allows women to deconstruct and transcend traditional gender roles through the re-telling of these traditional stories<sup>131</sup> and serves to further break down and critique dominant social narratives. Not only is female slash fan fiction a representation of “what women want male sexuality to look like,”<sup>132</sup> it is a way of questioning dominant narratives of female sexuality and subordination by using the very way that men often sexualize and subordinate women against them. In effect, by re-writing stories to illustrate two men having sex, these slash fan fiction writers are asking, “why can’t women be just as intrigued or turned on

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<sup>128</sup> *Id.* at 68.

<sup>129</sup> Katyal, *supra* note 13, at 468, 469. Katyal also explains, “[s]lash allows women, often left out of the marketplaces of content production, to rewrite narratives in imaginative and complicated ways and experiment with, abandon, or recreate notions about gender itself in the process.” *Id.* at 496.

<sup>130</sup> *Id.* at 486. Katyal explains:

Women rewrite archetypal hero figures who traditionally tend to propagate women's social marginalization and create narratives that undermine, rather than reinforce this patriarchy by depicting men as softer, more complicated and emotional human beings. Given the absence of strong female characters, many slash writers, Jenkins argues, simply choose “the path of least resistance in borrowing ready-made figures, such as Kirk and Spock, to express their utopian visions of romantic bliss.”

*Id.*

<sup>131</sup> *Id.*

<sup>132</sup> Lakshmi Chaudhry, *Hey Spock, Lookin' Good . . .*, WIRED, Sept. 5, 2000, available at <http://www.wired.com/culture/lifestyle/news/2000/09/38484> (last visited Jan. 16, 2010).

by two men having sex as men are by two women having sex?”<sup>133</sup> Why should two men having sex, or women being aroused by two men having sex, be so much less acceptable and more taboo than men feeling the same way about two women having sex?

Furthermore, the slash stories contain an emotional element, which male porn, often about an escape from responsibility and which includes sex not in the context of a relationship or an emotional bond, often does not. In slash, “sex is embedded within long-standing relationships. It comes with baggage.”<sup>134</sup> There is even a subgenre of slash fan fiction called “mpreg,” where women write about certain male fictional characters getting pregnant.<sup>135</sup> Rebecca Tushnet suggests that “it’s about playing with a different body and putting a male body in a position that women are expected to be in.”<sup>136</sup> Slash fan fiction gives women a space they didn’t have before the digital age: a space not only to write freely, but also to write about and express their sexuality publicly, something that has not always been possible.<sup>137</sup> These writers are engaging in defiant acts by creating these stories, and challenging the creators of the original works by demonstrating that they are unhappy with the ways in which stories are told.

## B. THE CURSE OF NEW TECHNOLOGY

Despite the fact that more women are using new technologies to create and disseminate their work, often in attempt to break down the control large corporations and media outlets have over culture, their efforts are frequently thwarted because of the over-inclusive copyright

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<sup>133</sup> *See id.*

<sup>134</sup> *Id.*

<sup>135</sup> Fan Fiction Writers Face Nonfiction Legal Hurdles, The Bryant Park Project from NPR News, July 16, 2008, <http://www.npr.org/templates/story/story.php?storyId=92577677>.

<sup>136</sup> *Id.*

<sup>137</sup> “Most fanfiction writers are women, and in writing erotic fanfiction we’re taking control of our own sexual and sensual drives. The pen is mightier than the sword, and in our hands the pen is feminine. When you look at the scope of recorded human history, women haven’t been writing for very long. So writing is, in some way, a subversive act. When you look at the scope of recorded human sexuality, women haven’t been in control of our bodies for very long. So writing about sex is twice as subversive as writing. Writing slash fiction is radical.” Kass, *Why I Write Slash*, The Fanfic Symposium, <http://www.trickster.org/symposium/symp15.htm> (last visited Jan. 29, 2010).

laws in the United States. “The [I]nternet has made persistent and findable things that are ordinary human creative activities . . . . Because it’s on the Internet, we have new audiences, and sometimes those audiences are copyright owners.”<sup>138</sup>

Mattel, the creator of Barbie dolls, has been particularly aggressive in its efforts to halt creators from using Barbie dolls in ways that it does not deem appropriate.<sup>139</sup> After Albertina Carri screened her film for the first time in Mexico City, Mattel, claiming the film was pornographic and would damage Barbie’s image, obtained a court order banning the film from being shown.<sup>140</sup> Mattel’s use of copyright law to ban this film demonstrates the stifling effect that copyright can have over culture. By preventing any type of sexual image of Barbie to be shown, Mattel is able to maintain its sanitized Barbie world and to perpetuate a de-sexualized image of women in general, because of what Barbie has come to represent.<sup>141</sup>

Similarly, the creator of *The Distorted Barbie* received a cease and desist letter from Mattel demanding that the website be taken down or else face litigation for copyright infringement.<sup>142</sup> Luckily, Margaux Lange, the creator of the Barbie jewelry, has not faced any lawsuits or threat of lawsuit from Mattel, but she does take precautions on her website and consciously does not use the word Barbie in the name of her jewelry and puts disclaimers on every webpage.<sup>143</sup>

<sup>138</sup> Legal Hurdles, *supra* note 135.

<sup>139</sup> See, e.g., *Mattel, Inc. v. Walking Mountain Prod.*, 353 F.3d 792 (9th Cir. 2003).

<sup>140</sup> Goldman, *supra* note 2, at 273.

<sup>141</sup> See *id.* at 274 (“The portrayal of Barbie as a lesbian is a problem for Mattel indeed . . . . And, although Mattel has unwittingly already released the first lesbian ‘friend of Barbie’ . . . homosexuality—any mention of sexuality at all—has always been absent from the thoroughly sanitized world of Barbie.”).

<sup>142</sup> Does the Distorted Barbie Violate Mattel’s copyright?, <http://detritus.net/projects/barbie/censored/censored.htm> (last visited Jan 16, 2010). Joan Livingston-Webber also describes a Mattel cease and desist order that was sent to the editor of a zine called *Hey There, Barbie Girl!* which “flogg[ed] everyone’s favorite girlie doll for four issues.” Mattel demanded that the editor cease publication of the zine upon threat of legal action, and because the editor did not have any legal resources she had no choice but to cease publication. Joan Livingston-Webber, *Gen-X Occupies the Cultural Commons*, in *PERSPECTIVES ON PLAGIARISM* 263, 268 (1999).

<sup>143</sup> Margaux Lange Unique Handcrafted Jewelry, [www.margauxlange.com](http://www.margauxlange.com) (last visited Jan. 16, 2010).

It is true that Mattel is suing many other potential infringers that aren't using Barbie or her counterparts necessarily for social commentary, such as the lawsuit over Bratz dolls.<sup>144</sup> The reasons underlying Mattel's lawsuits seem drastically different. While Mattel is threatened by Bratz dolls because of the direct effect these dolls have on their market, *The Distorted Barbie* and Albertina Carri's film not only seek to influence public perception of Barbie and perhaps convince mothers not to buy these dolls for their daughters, but they also threaten to dismantle Mattel's hold on American female sexuality and beauty. Without Bratz dolls on the market, we merely lose another unrealistic portrayal of the female body. Without works such as *The Distorted Barbie*, Carri's film and Lange's jewelry, we lose some of our ability to recognize these unrealistic beauty and sexuality standards.

Fan fiction writers face similar legal troubles because "fan fiction occupies a particularly vulnerable area within cyberspace" because of its use of copyrighted characters.<sup>145</sup> Furthermore, because fan fiction writers are often not aiming to satirize the original work, but instead adding their own experiences and stories into already existing work, their work may not fall under traditional fair use exceptions in copyright that protect certain types of parody.<sup>146</sup> "The idea of a parody is to use some elements from a prior author's work in order to reinterpret and subvert the intended meaning by offering a commentary on the original."<sup>147</sup> However, a parody must specifically target the original work and not just use the original work to make a comment about society or art in general.<sup>148</sup> Despite protections offered by the parody doctrine, application of the doctrine is limited. For example, "most fan fiction writers do not aim to criticize or satirize the original work but merely add to it in new and different ways."<sup>149</sup>

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<sup>144</sup> *Barbie Firm Awarded Bratz Payout*, BBC NEWS, Aug. 26, 2008, available at <http://news.bbc.co.uk/2/hi/business/7583328.stm>.

<sup>145</sup> Katyal, *supra* note 13, at 504.

<sup>146</sup> *Id.* at 511.

<sup>147</sup> *Id.* at 478-79.

<sup>148</sup> *Campbell v. Acuff Rose Music, Inc.*, 510 U.S. 569 (1994).

<sup>149</sup> Katyal, *supra* note 13, at 511.

Furthermore, as Katyal points out, Lucasfilm, the owner of *Star Wars*, claims to tolerate regular fan fiction, but does not tolerate slash fan fiction, making a distinction between “parodies” and “dramatic expansions.”<sup>150</sup> While Lucasfilm can claim protection under the boundaries of copyright law definitions, one cannot help but wonder if they are truly concerned about “dramatic expansions” or if they do not want these homosexual narratives associated with the *Star Wars* franchise. Katyal further suggests that “most copyright owners tend not to get involved with fan fiction *unless* a narrative involves graphic sexual content....”<sup>151</sup>

The Internet gives copyright owners the ability to monitor the type of content that is being created. They may use search engines to find potentially infringing content and then issue cease and desist letters. Writers of fan fiction often acquiesce to such demands because copyright owners typically have more money and resources to litigate.<sup>152</sup> These takedown notices are not unique to fan fiction, but are common on websites such as YouTube. If someone posts a video that contains something a copyright owner might consider infringing, YouTube might issue a takedown notice.<sup>153</sup> Because corporate

<sup>150</sup> *Id.* at 511-12.

<sup>151</sup> *Id.* at 513. Katyal further suggests that “slash fan fiction is considered to be especially transgressive because of its sexualization of mainstream characters. And because its story lines often involve ‘recoding’ these characters as gay, bisexual, or involved in a same-sex relationship with another character.” *Id.*

<sup>152</sup> See Tushnet, *supra* note 20, at 142 (“[F]ans may naturally choose to shut down or hide their activities rather than stand their ground.”).

<sup>153</sup> An example of a take-down notice issued by YouTube:

Dear \_\_\_\_\_,

Video Disabled

A copyright owner has claimed it owns some or all of the audio content in your video \_\_\_\_\_. The audio content identified in your video is \_\_\_\_\_. We regret to inform you that your video has been blocked from playback due to a music rights issue.

Replace Your Audio with AudioSwap

Don't worry, we have plenty of music available for your use. Please visit our AudioSwap library to learn how you can easily replace the audio in your video with any track from our growing library of fully licensed songs.

copyright owners tend to have so much financial and legal power, they can essentially force people to take down content that, if litigated, might be considered fair use.<sup>154</sup> Ultimately, the power of copyright holders prevents the public from knowing what types of work it is missing. As one attorney from the Electronic Frontier Foundation (“EFF”) explained, “the Internet has revolutionized political activism, allowing everyone to have his or her say on a global platform,” suggesting that it is important to protect these forms of activism and interpretation rather than discourage them with take down notices and litigation.<sup>155</sup>

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Other Options

If you think there's been a mistake, or you have other questions, please visit the Copyright Notice page in your account.

Sincerely,

The YouTube Content Identification Team

©2008 YouTube, LLC

Email from YouTube (Oct. 25, 2008) (on File with Author).

<sup>154</sup> In *Lenz v. Universal*, an ongoing lawsuit in the Northern District of California, the Electronic Frontier Foundation (EFF) is suing Universal Music on behalf of a mother who posted a video of her baby on YouTube. Stephanie Lenz uploaded a short video to YouTube of her toddler dancing to a Prince song in order to share it with her family and friends. Although the clip was only thirty seconds long, YouTube removed the video since Universal had claimed that it infringed the copyright of the song. “Under federal copyright law, a mere allegation of copyright infringement can result in the removal of content from the Internet.” Electronic Frontier Foundation, *Our Work, Lenz v. Universal*, <http://www.eff.org/cases/lenz-v-universal> (last visited Jan. 16, 2010). Universal’s motion to dismiss was denied in August 2008. *Id.*

<sup>155</sup> Electronic Frontier Foundation, Press Release, *Parody Website Back Online After Settlement of Bogus IP Claims*, <http://www.eff.org/press/archives/2009/02/02> (last visited Jan. 16, 2010). The attorney was responding to a recently settled case, where a New York City activist was forced to takedown her website ([weareunionsquare.org](http://weareunionsquare.org)), criticizing redevelopment efforts in New York City’s Union Square. *Id.* The copyright lawsuit led to a six month shutdown of the website. *Id.* The terms of the settlement included the activist’s promise “to transfer the original domain names, to use disclaimers, and to refrain from impersonating [Union Square Partnership] board members by name.” *Id.* See also Litman, *supra* note 34, at 116 (explaining that because copyright no longer only effects the few, but rather everyone in society, the copyright system needs to be devised so that ordinary citizens can live with its rules).



## V. CONCLUSION

A feminist approach to copyright law understands that merely trying to fit those who are oppressed into existing structures will not ultimately be productive or successful because it continues to reproduce the problematic hierarchy. Rather, “the better approach is to challenge the structure itself and the putative universalizability of the attributes and values it represents.”<sup>156</sup> While completely dismantling copyright law altogether may seem attractive, copyright law provides a valuable service to society, despite its flaws. It assures creators that their works will not be reattributed to someone else before they even have a chance to promote the work themselves.<sup>157</sup> Copyright law was intended to be a valuable system and to provide important protections, but it was not intended to be used to justify hierarchical control of artistic creation.<sup>158</sup>

Copyright doctrine is so complicated and fraught with political controversies that it is well beyond the scope of this article to try to suggest any kind of comprehensive reform effort that has not already been proposed.<sup>159</sup> The goal of this article is to highlight the gross disparity in the types of works that are privileged in the modern copyright system and how feminist theory can aid understanding of how copyright reflects a hierarchal and patriarchal project in keeping information in the hands of the few. As Ann Bartow explains, “[w]omen have never been positioned to define or dictate significant aspects of the social or cultural orders, so male domination of cyberspace is not unexpected, but neither should it go unobserved or uninterrogated.”<sup>160</sup> What may be most important in reforming copyright law is making known the current inequalities and the difficulties women face in disseminating their work as well as the ways in which copyright law actually can stifle important creations. If copyright law continues the way it is now, then it will start to operate

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<sup>156</sup> Craig, *supra* note 20, at 241.

<sup>157</sup> See LESSIG, REMIX, *supra* note 5, at 253 (explaining that “neither RW nor RO culture can truly flourish without copyright.”).

<sup>158</sup> See NETANEL, *supra* note 6, at 54.

<sup>159</sup> There are many authors who have proposed reforms to the current copyright system to embrace some of the ideas of collectivity and RW culture. See, e.g., Lessig, Remix, *supra* note 15; Netanel, *supra* note 6; Litman, *supra* note 34.

<sup>160</sup> Bartow, *supra* note 80, at 474.

as a criminal code of law rather than a civil system to promote creativity.<sup>161</sup>

Much of modern feminist thought centers on collectivity and cooperation, while much of copyright law centers on ideas of the “romantic author,” an author who has total control over his work.<sup>162</sup> bell hooks emphasizes the idea of sisterhood, of coming together to create a movement, and of sharing in a struggle to reform a patriarchal society.<sup>163</sup> Perhaps the most powerful lesson that copyright law can take from feminism is the idea of collectivity and sharing. Sharing creations can only serve to promote more creativity. This is the basic mindset behind organizations such as Creative Commons<sup>164</sup> and the Organization for Transformative Works,<sup>165</sup> which

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<sup>161</sup> See Livingston-Webber, *supra* note 142, at 268 (“For those GenX writers of texts at home in a postmodern world, copyright becomes more and more a clone of the Napoleonic tax code: a source of anxiety, a venue where one is guilty unless she can prove herself innocent, a bureaucracy whose tangled rules and regulations require at least a staff of lawyers to defend any practice beyond the prototypical.”).

<sup>162</sup> See Dan L. Burk, *Copyright and Feminism in Digital Media*, 14 J. GENDER SOC. POL’Y & L. 519, 545-46 (2006) (“Historical analyses of institutionalized publication show that the milieu from which notions of authorship and copyright are drawn were rife with notions of paternity over texts that the masculine author had ‘begotten.’”).

<sup>163</sup> See generally HOOKS, *THEORY*, *supra* note 96, 43-67.

<sup>164</sup> From the mission statement of Creative Commons, which was largely founded by Lawrence Lessig and a handful of other scholars who wanted to address the problem of corporate control over culture:

Creative Commons is a nonprofit corporation dedicated to making it easier for people to share and build upon the work of others, consistent with the rules of copyright.

We provide free licenses and other legal tools to mark creative work with the freedom the creator wants it to carry, so others can share, remix, use commercially, or any combination thereof.

Creative Commons, About, <http://creativecommons.org/about/> (last visited Jan. 29, 2010).

A Creative Commons License allows anyone to use works licensed under creative commons for any non-profit use without having to worry about being sued for copyright infringement. Lessig notes that since the inception of Creative Commons, “millions of digital works have been marked to signal this freedom rather than control.” LESSIG, REMIX, *supra* note 15, at 278.

<sup>165</sup> The Organization for Transformative Works focuses on fan works, such as fan fiction and slash fan fiction:

seek to protect and promote this kind of collective creation and sharing of previous works by advocating for different types of licensing schemes under copyright law. These organizations also advocate that works such as fan fiction are transformative and should not be considered a violation of the fair use doctrine.<sup>166</sup> Promoting these organizations and creating others might be the first step to getting the law in sync with the needs of the broader public which extends far beyond corporations such as Disney and Mattel.

A feminist critique of copyright recognizes that the law works to protect patriarchal systems of creation and does not provide space for alternative narratives or for critical dialogue with dominant narratives. I have tried to demonstrate that there are many women who are being hurt by the current copyright regime. When women try to create works that question the largely male-centric narratives and images that are fed through the mass media, by using those very stories and images in their own work, they face claims of copyright infringement.

Ultimately, it is hard to envision a copyright regime that is perfect. But in considering the ways in which current copyright law often stifles those who are trying to fight against corporate control, it is clear that just accepting what the law dictates is not a good solution. The best we may be able to do is to keep these considerations and this tension in mind as we continue to work toward reform.

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We envision a future in which all fannish works are recognized as legal and transformative and are accepted as a legitimate creative activity. We are proactive and innovative in protecting and defending our work from commercial exploitation and legal challenge. We preserve our fannish economy, values, and creative expression by protecting and nurturing our fellow fans, our work, our commentary, our history, and our identity while providing the broadest possible access to fannish activity for all fans.

Organization for Transformative Works, What We Believe, <http://transformativeworks.org/node/100> (last visited Feb. 26, 2009). The organization acknowledges that fan culture is “historically rooted in a primarily female culture,” and seeks to preserve this history and to promote others’ ability to access it. *Id.*

<sup>166</sup> See *id.*; Creative Commons, About, <http://creativecommons.org/about/> (last visited Apr. 12, 2009).

